United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7505

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FOR THE SECOND CIRCUIT

EMPRESA PUBLICA DE COMERCIALIZACION DE HARINA Y ACEITE DE PESCADO and EMPRESA PUBLICA DE SERVICIOS AGROPECUARIOS,

Plaintiffs-Appellants,

—against—

BERGEN SHIPPING CO., LTD.,
BREDA SHIPPING CO., LTD.,

Defendants,

—and—

CONTINENTAL GRAIN COMPANY and
CONTINENTAL GRAIN EXPORT CORPORATION,

Defendants-Appellees.

BRIEF ON BEHALF OF PLAINTIFFS/APPELLANTS EMPRESA PUBLICA DE COMERCIALIZACION DE HARINA Y ACEITE DE PESCADO, AND EMPRESA PUBLICA DE SERVICIOS AGROPECUARIOS

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Statement of Issues Presented For Review

Preliminary Statement

This is an action at law involving an alleged breach of contract brought by plaintiffs who are corporations publicly owned by the Government of Peru against Continental Grain Export Corporation, (hereinafter EXPORT), which sold to them 26,670 metric tons of #3 yellow corn to be shipped by Export on a ship to be chartered by it to the

appellants in Lima, Peru. The corn arrived at Callao, the port city for Lima in an obviously bad condition with the cargo moldy, contaminated, short and deteriorated. The top was skimmed off and burned with everybody's approval. Appellants instituted suit against Export, Continental Grain Company (hereinafter GRAIN COMPANY), which apparently was the voyage charterer of the SS YUKON MART, the ship involved, against the YUKON MART and its owner Bergen Shipping Co., Ltd. (hereinafter BERGEN), and time charterer Breda Shipping Co., Ltd. (hereinafter BREDA), all in one law suit in the Southern District of New York.

Grain Company moved to stay the action as against it on the ground that the bill of lading contained the incorporation of an arbitration cause from a form called "Centrocon Charter Party". Export moved for a stay of action against it on the ground that the contract of sale called for arbitration in England under a form agreement called "GAFTA No. 30". The ship, Bergen and Breda answered the complaint and filed third party complaints against Export and Grain Company.

On the arguments of the motion before the Honorable Judge Richard Owen, the lower Court granted both of the motions, on the ground that appellants had agreed to two different arbitrations in London.

Initially appellants appealed from the order of Judge Owen as against Export and Grain Company both, but the action against Grain Company being in admiralty and the law being very clear that this Court has no jurisdiction to review the order of Judge Owen for a stay, appellants have withdrawn the appeal as to Grain Company.

This appeal, therefore, is simply from the order of Judge Owen staying the law action against Export on the ground

that the parties had agreed to arbitrate their disputes in London.

The Issues Presented For Review

The simple issue presented for review on this appeal is whether or not the parties agreed to arbitrate their disputes in London under the contract of sale. Appellants take the position that a proper interpretation to the contract calls for a decision that there was no agreement to arbitrate in the contract of sale.

Statement of the Case

Appellants instituted suit in the Southern District of New York against all of the parties involved in the sale and the transportation of the corn to Peru. That includes the seller, Export, its agent Grain Company, which voyage chartered the vessel and named itself as the shipper under the bill of lading, against the ship itself, the SS YUKON MART, its owner Bergen and its time-charterer Breda. Bergen and Breda have filed and served third party complaints against Export and Grain Company. (App. 51a through 71a). As of now the direct action by appellants as against Export and Grain Company have been stayed by the lower Court. But they are both still in the action as third party defendants because of the shipowner's and charterer's third party complaint. On September 8, 1976 the district Court rendered its decision staying the direct actions against Export and Grain Company. On September 17, 1976 appellants moved for a rehearing on the ground that the lower Court failed to touch the issues involved. On November 29, 1976 the lower Court denied the motion for rehearing.

This appeal was brought on October 8, 1976 appealing both the stay of the action against Export and the stay of action against Grain Company. The decision of this Court through Judge Gurfein in *Tradex Limited, et al.* v. *M. V. Holendrecht, etc., et al,* Second Circuit, Docket No. 76-7346, decided March 15, 1977 (not yet officially reported) being extremely clear appellants have withdrawn their appeal as it concerns the stay of the action against Grain Company but appellants reserve the right then to arbitrate in London and to return to this Court in the future if necessary, when the decision by Judge Owen then might be considered final. This appeal then concerns only the lower Court's stay of the law action against Export.

Statement of Facts Relevant to the Issues

The original action against all of the defendants seeks a recovery for $700,000.00 as a result of shortage, damage, deterioration and contamination of a shipment of 26,670 metric tons of No. 3 yellow corn which was loaded on board the SS YUKON MART at Philadelphia, Pennsylvania on July 15, 1974, for carriage and transportation to Callao, Peru. The trip should have taken no more than fifteen (15) days but the ship arrived at Callao forty-five (45) days later at which time the deficiencies in the cargo were noted.

The shipment was purchased by plaintiff Empresa Publica De Servicios Agropecuarios (hereinafter EPSA), a public corporation of the Government of Peru to satisfy a then present national shortage of maize in Peru. Public bids were solicited at Lima, Peru, and, on July 3, 1974 Export submitted its offer to EPSA (App. 23a, 39a, 40a). Export's bid was accepted by EPSA, and, on July 3, 1974 a contract for the sale of the subject shipment was entered into between the two parties (App. 17a through 21a).

The sixth clause of the contract of sale (19a, 21a) incorporated by reference Export's offer of sale. That offer of sale provides under "Other Conditions", (23a, 39a):

> "The quantity, condition and quality are final on loading, according to the bills of lading, and all other conditions will be in accordance with NAEGA No. 2".

The seventh clause of the contract of sale (19a, 21a) further provides: (English translation)

> "The parties indicate as domicile: The SELLER as Jiron Camana 851, Lima. The BUYER as Jr. Cahuide 805, 7th Floor, Jesus Maria and submit themselves to the judges of Lima, Peru, waiving any other [jurisdiction] which may favor them. Likewise they waive any intervention or claim of diplomatic nature."

The parties to the contract of sale having specifically provided for judicial jurisdiction at Lima, Peru and waiving any other which may favor them, the arbitration clause of NAEGA No. 2 was inapplicable.

On July 8, 1974, addendum No. 1 (22a, 44a) was added to the contract of sale by the parties which reads as follows:

> "In consideration of the fact that North American Export Grain Association (NAEGA No. 2) covers the acquisitions on the basis FOB and the sale has been made on the basis of "Cost and Freight", it is established under mutual accord that *other conditions not specified in our contract* will be governed by the clauses stipulated in Contract Grain and Feed Trade Association No. 30 (GAFTA No. 30), *specific for purchases* [sic] *on the basis of "Cost and Freight"*. (emphasis supplied).

Since quality and Peruvian jurisdiction are specifically provided for in the contract of sale, the arbitration clause of GAFTA No. 30 is likewise inapplicable. Arbitration was, therefore, not demanded by plaintiffs of defendant Export.

It is appropriate at this time to call to the Court's attention the document entitled GAFTA No. 30 (App. 24a, 24a-1, 25a, 25a-1) which was attached to Export's moving papers. That Exhibit is dated September 2, 1974 to be effective on that date. It incorporates the arbitration rules of "GAFTA No. 125" in force on the date of the contract. Also attached to Export's moving papers are the arbitration rules of GAFTA No. 125 (26a through 29a) with an effective date of 1st of October, 1974. The contract of sale, however, is dated July 3, 1974 and addendum No. 1 to that contract is dated July 8, 1974. Certainly rules drawn after the contract of sale had been signed could not have been within the contemplation of the parties when they reached their agreement.

We also note for the Court's attention that the "GAFTA No. 30" form attached to defendant Export's moving papers as Exhibit D, applies, by the Exhibit's very language, *only to sales on "C.I.F. terms"*. Addendum No. 1 to the contract of sale, however, particularized as the reason for substituting the "NAEGA No. 2" form with "GAFTA No. 30" that the former applied only to FOB sales and the latter to C & F contracts. With the sale in question on a C & F basis, the GAFTA No. 30 form clearly fails to conform to the terms of the instant sale of corn. Plaintiffs cannot explain to this Court why this was done in this manner, particularly since the contract of sale itself provided for the submission of the parties to the sale to the Courts of Peru.

Summary of Argument

It is appellant's contention that appellants, under a proper interpretation of the contract of sale, never agreed to arbitrate the dispute concerning quality in London, England, especially not under the arbitration rules of GAFTA No. 30. The quality of the corn was one of the conditions clearly specified in the contract and the judicial forum of Lima, Peru was clearly agreed to, while the rules put in evidence by Export were not even in existence at the time the contract of sale was entered into.

The lower Court's finding that the jurisdictional clause was vague is in error. It is about as clear as it could be. The lower Court's finding that appellants had waived the Peruvian jurisdictional clause is also in error. Appellants instituted suit against Export and Grain Company as well as the ship, its owner and charterer in order to have in one law suit all of the parties possibly responsible to it for this large financial loss. Export's argument in the lower Court that appellant waived the jurisdictional clause ca'ling for law suits in Lima, Peru is not relevant to its motion for a stay based on the alleged arbitration clause. If it had moved for an order staying the action pending litigation in Lima, Peru, its action would have been more understandable. In any event, appellants reasonable action in bringing all of the defendants together in one law suit when it could have sued in Lima, Peru before what would undoubtedly be a friendly tribunal does not remotely bear upon the issue whether or not it had agreed to arbitrate in London.

POINT I

Appellants and Continental Grain Export Corporation Did Not Agree to Arbitrate But Did Agree to Peruvian Jurisdiction.

The issue of arbitrability is a question for the Court to be determined by the contract entered into by the parties. *Drake Bakeries* v. *Local 50* (1962), 82 S. Ct. 1346, 370 U.S. 254, 8 L.Ed. 2d 474. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. *District 2, Marine Eng. Ben. Ass'n.* v. *Falcon Carriers, Inc.* (S.D.N.Y. 1974), 374 F. Supp. 1342; *Lawson Fabrics, Inc.* v. *Akzona, Incorporated* (S.D.N.Y. 1973), 355 F. Supp. 1146, aff'd, 486 F.2d 1394. At the threshold in deciding whether this action can be stayed, this Court must determine whether the parties agreed to submit their disputes under the contract for the sale of the corn to arbitration.

On July 3rd, 1974, at Lima, Peru, appellant, Empresa Publica De Servicios Agropecuarios (hereinafter referred to as "EPSA"), a public corporation of the government of Peru, entered into a written contract for the purchase of 25,000 long tons of No. 3 yellow corn with Continental Grain Export Corporation (hereinafter referred to as "EXPORT"). The contract provides in relevant part as translated into English:

> ". . . the parties indicate as domicile: THE SELLER as Jiron Camana 851 Lima. The BUYER as Jr. Cahuide 805, 7th Floor, Jesus Maria and submit themselves to the judges of Lima, Peru, waiving any other [jurisdiction] which may favor them likewise they waive any intervention or claim of diplomatic nature."

On July 8th, 1974, Addendum Number 1 was added to the contract of sale by the parties; the English translation of which reads as follows:

> "In consideration of the fact that North American Export Grain Corporation (NAEGA No. 2) covers the acquisitions on the basis FOB and the sale has been made on the basis of "Cost and Freight", it is established under mutual accord that *other conditions not specified in our contract* will be governed by the clauses stipulated in Contract Grain and Feed Trade Association No. 30 (GAFTA No. 30) specific for purchaser [sic] on the basis of "Cost and Freight". (emphasis supplied).

Since quality and Peruvian jurisdiction are specifically provided for in the contract of sale, and the parties thereto submit themselves to the jurisdiction of the Courts of Peru, the arbitration clause of the GAFTA No. 30, which provides for arbitration in London, was clearly inapplicable. The plain import of the language of the contract provided for jurisdiction of disputes by the Courts of Lima, Peru. The contract being sufficiently definite and certain and their having been no agreement between EPSA and Export to arbitrate disputes under the contract, arbitration cannot be imposed upon EPSA. There is no policy which favors forcing a party to arbitrate when he has not agreed to do so. *Metal Products Workers Union, Local 1645* v. *Torrington Co.* (2d Cir. 1966), 358 F.2d 103.

Since arbitration of disputes between EPSA and Export was not agreed to by the parties to the contract of sale, this Court should reverse the holding of the lower Court that they did and deny Export's motion for a stay of the action.

CONCLUSION

The Order of the Lower Court Should Be Reversed and the Actions Against the SS Yukon Mart, the Shipowner, the Charterer and the Seller of the Corn Should Be Allowed to Go Forward Together.

Respectfully submitted,

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IS HEREBY ADMITTED

THIS 4th DAY OF April 1977

George E Dalton

~~Attorney(s)~~ for

KCK for Bergen + Bissa Shipping

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By Mary E Cullinane

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Atty for Continental Grain Company